COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion as to the propriety of the rates and charges set forth in M.D.T.E No. 17, filed with the Department on May 5, 2000 and June 14, 2000 to become effective October 2, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	)	**D.T.E. 98-57, Phase III**

REPLY COMMENTS OF VERIZON MASSACHUSETTS

Despite the clear preemptive effect of the FCC's *Triennial Review Order*,[1] AT&T Communications of New England ("AT&T") and Covad Communications Company ("Covad") urge the Department to continue its investigation of Packet at the Remote Terminal Service ("PARTS") on the frivolous grounds that the Department can override the FCC's national finding that competitive local exchange carriers ("CLEC") are not impaired without unbundled access to packet switching technologies. *Triennial Review Order*, ¶ 537; AT&T October 3, 2003, Comments, at 7; Covad October 3, 2003, Comments, at 3-4. The tortured interpretation of federal case law and the FCC's *Triennial Review Order* proffered by AT&T

[1] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*").

and Covad cannot provide a lawful basis for the Department to require the provision of PARTS under a state unbundling requirement. Indeed, AT&T and Covad wholly ignore the fact that PARTS is an interstate offering and, therefore, *not* subject to state jurisdiction. In light of the FCC's decision, Verizon Massachusetts ("Verizon MA") respectfully requests that the Department dismiss this proceeding.

I. DISCUSSION

A. Contrary to AT&T's and Covad's Claims, the Department Has Not Undertaken an Impairment Analysis Relative to PARTS and Has No Authority To Do So.

AT&T admits that the FCC's *Triennial Review Order* held that incumbent local exchange carriers ("ILEC") are not required to offer unbundled packet switching technology. AT&T Comments, at 3. Nevertheless, AT&T and Covad dismiss the preemptive effect of that decision on state commissions and urge the Department to continue its investigation into the provision and unbundling of PARTS, as if nothing has changed. AT&T Comments, at 9; Covad Comments, at 6. This contradicts the clear directives of the FCC's *Triennial Review Order* and its effect on the scope of the Department's regulatory authority in this proceeding. Accordingly, the Department must reject AT&T's and Covad's request.

In this proceeding,[2] the Department applied the FCC's limited, four-pronged test for unbundling packet switching set forth in the *UNE Remand Order*,[3] and found that those

[2] Throughout its comments, AT&T mischaracterizes the October 18, 2002, Hearing Officer Ruling as a Department "order." That ruling proposed to expand the scope of this proceeding to include: (1) an independent "necessary and impair" analysis by the Department to consider unbundling Verizon's PARTS offering; and (2) an investigation of Electronic Loop Provisioning ("ELP") over PARTS technology. Contrary to AT&T's claims, the Department has *not* determined that further investigation of PARTS "is necessary to ensure that Verizon MA does not obtain a first mover advantage over CLECs." AT&T Comments, at 1. Nor has the Department "ordered that the formal proceeding would include an examination of ELP." AT&T Comments, at 1.

conditions were not met. D.T.E. 98-57, *Phase III Order*, at 87-88 (September 29, 2000). In its *Triennial Review Order*, the FCC eliminated those limited unbundling exceptions for packet switching. *Triennial Review Order*, ¶ 540. The FCC further declared, "on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs" and, therefore, "decline[d] to unbundle packet switching as a stand-alone network element." *Triennial Review Order*, ¶ 537. The FCC also declined to require ILECs to provide ELP, which "would require dramatic and extensive alterations to the overall architecture of every incumbent LEC network." *Triennial Review Order*, ¶ 491.

In light of the FCC's decision, the Department has no authority to require Verizon MA to offer PARTS and is preempted from imposing unbundling requirements on PARTS. The thrust of AT&T's and Covad's arguments is that the Department should ignore the FCC's national finding in its *Triennial Review Order* that CLECs are not impaired without unbundled access to packet switching technologies, and embark on its own independent investigation. *Triennial Review Order*, ¶ 537; AT&T Comments, at 9-10; Covad Comments, at 3-4. This is not a lawful prerogative of the Department.

In its *Triennial Review Order*, the FCC expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified in this Order." *Triennial Review Order*, ¶ 189. The FCC's decision not to require unbundling of packet switching technology is

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In addition, AT&T ignores the fact that Verizon MA has appealed the October 18th Hearing Officer ruling on the grounds that it is inconsistent with Department orders, applicable court and FCC decisions and the Telecommunications Act of 1996 (the "Act") and an abuse of discretion. Verizon MA's Motion for Appeal, at 1, 9-14.

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-

consistent the FCC's overriding policy for broadband services and the national objective "to encourage the provision of new technologies and services to the public" pursuant to Section 706 of the Act. 47 U.S.C. § 157(a); *Triennial Review Order*, ¶¶ 288, 541. As a result, the FCC found that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities." *Triennial Review Order*, ¶ 187. As the FCC declared, "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *Triennial Review Order*, ¶ 187.

AT&T's and Covad's attempt to challenge the FCC's preemptive authority in this proceeding is inappropriate. AT&T Comments, at 8-14; Covad Comments, at 4-8. The FCC's *Triennial Review Order* specifically established national regulatory requirements for packet switching technology, such as PARTS. Any effort to overturn the FCC's clear preemption decision lies in the courts, not with the Department. Moreover, AT&T's and Covad's argument that the Department has somehow retained the right to impose additional unbundling requirements distorts case law and the FCC's own statements in the *Triennial Review Order*. AT&T Comments, at 8-14; Covad Comments, at 4-8.

As the U.S. Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000).

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98 (rel. Nov. 5, 1999) ("*UNE Remand Order*"); *see also* 47 C.F.R. § 51.319(c)(5)

In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns.[4]

In its *Triennial Review Order*, the FCC made the national policy determination not to require the unbundling of packet switching technology, and states are not at liberty under the Supremacy Clause to frustrate or disregard that federal policy. As the FCC stated,

> We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so. Their argument ignores the clear directives Congress provided in the 1996 Act. Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and does not substantially prevent the implementation of our federal regime. Their argument also ignores the fact that prior Commission actions clearly had preemptive effect; as noted above, in the *UNE Remand Order*, the Commission prohibited the states from removing UNEs from the federally mandated list.

Triennial Review Order, ¶ 193. Therefore, the FCC has authority under Section 251(d)(3) of the Act and "long-standing federal preemption principles" to preclude states from adding to the list of unbundled network elements ("UNEs") established by the FCC – which list does not include PARTS. *Triennial Review Order*, ¶¶ 192, 537-41. In fact, the FCC has exercised

[4] *See e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

that authority and preempted state attempts to override its decision to remove certain network elements from the national list of UNEs.[5] *Triennial Review Order*, ¶¶ 193-95.

AT&T and Covad nevertheless rely on the Sixth Circuit Court of Appeals' opinion in *Michigan Bell v. MCIMetro* to support their contention that states may require access to additional UNEs "as long as the regulations do not interfere with the ability of new entrants to obtain services." AT&T Comments, at 12-13; Covad Comments, at 9-10. This is a grossly overbroad reading of the *Michigan Bell Order*. In that case, the "state regulation" at issue was a tariff provision that permitted CLECs to submit resale orders by facsimile. It was in that context, and that context *only*, that the Sixth Circuit determined that faxing orders did not "substantially prevent implementation" of the federal regime. *Michigan Bell v. MCIMetro*, 323 F.3d 348, 361 (6th Cir. 2003).

Nothing in the *Michigan Bell Order* stands for the proposition that a state may require access to "services" where the FCC has expressly determined, "on a national basis, that competitors are not impaired without access" to such services. *Triennial Review Order*, ¶ 537. To the contrary, the Sixth Circuit reiterated its prior holding in *Verizon N., Inc. v. Strand* that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach its goal.'"[6] 309 F.3d 935, 940-41

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[5] As Verizon MA explained in its initial comments, a separate declaratory ruling by the FCC is *not* a prerequisite to preemption under Section 251(d)(3). Verizon MA Comments, at 8 n.8. Rather, the remedy of a declaratory ruling is meant to provide guidance in close cases. This is not a close case. Any attempt by the Department to require PARTS or impose an unbundling requirement on PARTS would conflict with the FCC's *Triennial Review Order*, ¶¶ 192, 289, 537-41. The same is true of ELP at this time. *Triennial Review Order*, ¶ 491.

[6] *See also Wisconsin Bell, Inc. v. Bie*, 2003 U.S. App. LEXIS 16514, *9 (7th Cir. August 12, 2003) ("A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause

(6th Cir. 2002), quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Therefore, nothing in the *Michigan Bell Order* supports the argument that the Department should continue its consideration of PARTS and ELP or otherwise disrupts the federal framework established in the FCC's *Triennial Review Order*.[7]

Finally, the Department has no authority to impose additional unbundling requirements for PARTS under Section 271 of the Act, as AT&T and Covad erroneously suggest. AT&T Comments, at 14-16; Covad Comments, at 18-24. In its *Triennial Review Order*, the FCC recognized that former Bell Operating Companies ("BOCs") have ongoing access obligations under Section 271. *Triennial Review Order*, ¶ 653. However, even if there was a Section 271 obligation that applied to PARTS, the FCC - not the Department – is the sole authority for determining the scope of that obligation. *See Triennial Review Order*, ¶¶ 663-64. Nothing in Section 271 gives such authority to the states.

In short, contrary to AT&T's and Covad's claims, the Department and the parties are *not* "in the same position that they were prior to the *Triennial Review Order*" (Covad Comments at 1-2) concerning unbundled access to broadband facilities, such as PARTS. The FCC has clearly and definitively found that CLECs are not impaired without access to the facilities and that "no unbundling best serves [its] statutorily-required goal" to ensure that both

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to resolve the conflict in favor of federal law.").

[7] Likewise, the Vermont Public Service Board decision relating to the resale of voice messaging service ("VMS") cited by AT&T does not support the Department's investigation of PARTS or ELP. AT&T Comments, at 9, citing *In re Petition of Verizon New England*, 795 A.2d 1196, 1204 (2002). Unlike VMS, on which the FCC has made no express ruling, the FCC has explicitly found in its *Triennial Review Order* that the unbundling of packet switching technology is not required, and the state commissions do not have the authority to overturn that ruling. *Triennial Review Order*, ¶ 195.

incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure. *Triennial Review Order*, ¶ 541.

Likewise, the FCC's *Triennial Review Order* precludes the Department from considering whether Verizon MA should be required to include ELP over PARTS technology. Not only is ELP a new issue unrelated to PARTS, but the FCC found that the feasibility of ELP is not established and declined to require ELP at this time. *Triennial Review Order*, ¶¶ 489 n. 1517, 491. Thus, the Department has no authority to require Verizon MA to modify its current network (which is not currently compatible with ELP, as envisioned by AT&T) to provide CLECs with access to a "superior, as-yet unbuilt" network, as the theoretical ELP construct would require. Verizon MA's Motion for Appeal, at 22.

B. Contrary to AT&T's and Covad's Claims, the Department Has No Authority Over PARTS Because This Is Not An Intrastate Offering.

AT&T and Covad contend that the Department is empowered under Massachusetts law to investigate the rates, terms and conditions of PARTS. AT&T Comments, at 14-16; Covad Comments, at 14-16. That argument is wrong.

First, as discussed above, the FCC undisputedly preempts packet switching technology in its *Triennial Review Order*, and the Department has no authority to overturn that ruling. Therefore, although AT&T and Covad disagree with the FCC's finding, state commissions are bound by that determination.

Second, AT&T's and Covad's argument assumes that the Department has jurisdiction over PARTS under Massachusetts law. This is incorrect. PARTS is an interstate offering and thus subject solely to the FCC's jurisdiction.

Contrary to Covad's claim, Verizon MA did not file a "proposed" intrastate PARTS tariff, but filed an illustrative tariff solely to comply with the Department's directives. Covad Comments, at 3, 19; *see also* D.T.E. 98-57, *Phase III Order*, at 87 (September 29, 2000); D.T.E. 98-57, *Phase III-A Order*, at 45 (January 8, 2001). Throughout this proceeding, Verizon MA has demonstrated that a state tariff is *not* required for PARTS because it is an interstate offering subject to FCC jurisdiction. Verizon MA's Motion for Appeal, at 7-9.

PARTS is an interstate service because of its underlying ADSL technology, which – like other Digital Subscriber Line ("DSL") transport services - will be used primarily to connect to packet-switched, Internet traffic.[8] Verizon MA's Motion for Appeal, at 7. The FCC has repeatedly ruled that in the packet-switched environment of the Internet, traffic is predominantly "interstate" for jurisdictional purposes (and that the intrastate component, if any, cannot reliably be separated from the interstate component).[9] Verizon MA's Motion for Appeal, at 8-9.

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[8] That ADSL technology specifically provides a high-speed, packet data connection, rather than a circuit-switched, dial-up connection.

[9] The FCC has found that jurisdiction is determined by the "end-to-end" nature of the communication, not merely the physical location of the technology or the transmission of the component parts. For example, the FCC found that Internet traffic is not "jurisdictionally intrastate" because it "originates with an Internet service provider's ("ISP") end-user customer and continues beyond the local ISP server to websites or to other servers and routers that are often located outside the state." *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunication Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order, ¶¶ 14, 58-59 (rel. Apr. 27, 2001).

Likewise, the FCC has already rejected claims that the "end-to-end" ADSL communication consists of two distinct components: an intrastate "local" call terminating at the ISP's local server, followed by a second, separate transmission from the ISP server to the Internet, which would be considered an interstate "information service." *See In the Matter of Bell Atlantic Telephone Cos., et al*, CC Docket No. 98-103, FCC 98-317, *Memorandum Opinion and Order*, 13 FCC Rcd 23667, ¶13 (1998); *see also In the Matter of GTE Telephone Operating Cos.*, CC Docket No. 98-79, FCC 98-292, *Memorandum Opinion and Order*, ¶ 16 (rel. Oct. 30, 1998); *In the Matter of GTE Telephone Operating Cos.*, CC Docket No. 98-79, FCC 98-292, *Memorandum Opinion and Order*, ¶ 16 (rel. Oct. 30, 1998).

Finally, there is nothing in Massachusetts law - and the carriers point to no such provision - which gives the Department authority to carve out a single service and create an unbundling obligation out of whole cloth. In any event, any unbundling under state law would have to be consistent with the Act and the FCC rules. Here, not only has the FCC expressly found that the Act does not require the unbundling of broadband facilities, but any attempt by a state to impose such a requirement would frustrate the federal policies adopted by the FCC and would be lawful under the Act. *See Triennial Review Order*, ¶ 195. Accordingly, AT&T's and Covad's argument that the Department has jurisdiction to determine the rates, terms and conditions for PARTS is unfounded.

C. Contrary to Covad's Claims, There Is No Basis to Investigate Line Splitting and/or Line Sharing In This Proceeding.

Covad urges the Department to review in this proceeding "the DSL needs of competitors for loops provisioned over the High Frequency Portion of the Loop ("HFPL") used to provide a line splitting service (CLEC voice and CLEC data) via hybrid loops and a line shared service (ILEC voice and CLEC data) via hybrid and all-copper loops." Covad Comments, at 2. Covad's argument is without merit. Not only are those issues beyond the scope of this investigation, but the FCC has preempted the Department on these issues in its *Triennial Review Order*.

The FCC eliminated the requirement that incumbent LECs must provide access to the HFPL. *Triennial Review Order*, ¶ 260. The FCC expressly declined to readopt its line

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The FCC has not only rejected the two-call theory for Internet traffic and ADSL services, but also in the context of calls involving enhanced services, *e.g.*, Bell South MemoryCall. *See Petition of BellSouth*, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992).

sharing rules, concluding that they ran counter to the goals of "encouraging competition and innovation in all telecommunications markets." *Triennial Review Order*, ¶ 261. As a result, the FCC established a three-year transition period for new line sharing arrangements, and grandfathered existing line sharing arrangements until the next biennial review, scheduled for 2004. *Triennial Review Order*, at ¶ 264, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A). Therefore, as explained above, under the Supremacy Clause, the Department must yield to the federal framework established in the *Triennial Review Order* and reject Covad's claim. Covad Comments, at 2, 17.

Likewise, there is no basis for the Department to investigate line splitting in this proceeding, as Covad erroneously suggests. Covad Comments, at 2-3, 3-24. Verizon MA has an effective, intrastate tariff for line splitting, and an established process for providing line splitting to CLECs. Covad participated in the proceeding that produced comprehensive tariff terms for line splitting, and it raises nothing in its Comments that provides cause for the Department to reexamine that recently approved tariff.

II. CONCLUSION

Given the clear preemptive effect of the FCC's *Triennial Review Order*, the Department should not conduct a further investigation of PARTS or ELP. To continue its investigation would directly conflict with, and substantially prevent implementation of, the federal regulatory regime adopted by the FCC in its *Triennial Review Order* and is thus preempted.

Nothing in the Act or state law authorizes the Department to ignore the new federal rules or to refuse to implement them in Massachusetts. Moreover, this is not the proper forum for consideration of such issues because PARTS is an interstate offering.

Accordingly, the Department should move promptly to close this proceeding as moot.

Respectfully submitted,

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